Supreme Court, U.S.
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No. 86-1258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DIERK HAGEMANN,
Petitioner,

VS.

AMERICAN SAVINGS AND LOAN ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a nonjudicial foreclosure sale of real property may be voided as a fraudulent conveyance under 11 U.S.C. section 548, when the deed of trust under which the foreclosure sale was conducted was perfected more than one (1) year before the filing of the petition for relief under Title 11 of the United States Code?

STATEMENT OF CORPORATE RELATIONSHIP

American Savings and Loan Association ("American") is a corporation which is a wholly-owned subsidiary of Financial Corporation of America, a corporation. American has no subsidiaries, other than wholly-owned subsidiaries, and no affiliates.

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RESTATEMENT OF THE CASE

Because Petitioner's Concise Statement of the Case fails to describe proceedings below, Respondent submits the following Restatement of the Case.

On October 24, 1984, Petitioner filed his petition for relief, under Title 11 U.S. Code, entitled *In re Hagemann,* Chapter 11 Case No. LA 84-21176-BR, United States Bankruptcy Court, Central District of California. On December 21, 1984, Petitioner filed in the same court his Complaint To Set Aside Sale (Defective Sale), Adversary Proceeding No. LA 84-53394-BR. [Appendix R-A]. The complaint sought to void a nonjudicial foreclosure sale conducted by Respondent in September, 1984, by which Respondent sold and purchased the Petitioner's residence. The complaint sought to void the foreclosure sale on two alleged grounds: (i) the sale failed to comply with the procedural requirements of California Civil Code sections 2924, *et seq.,* and (ii) the

sale constituted a fraudulent conveyance under U.S.C. section 548.

On April 26, 1985, the Bankruptcy Court entered its Order Adjudicating In Favor Of Defendant And Against Plaintiff On Plaintiff's Claim Of Fraudulent Transfer (11 U.S.C. Section 548). By the order's terms, the Bankruptcy Court: (i) adjudicated against Petitioner the claim that the foreclosure sale constituted a fraudulent transfer under 11 U.S.C. section 548, and (ii) left for future proceedings the remaining state law issues.

Petitioner appealed the Bankruptcy Court's decision to the District Court. On November 18, 1985, the District Court entered its minute order affirming the Bankruptcy Court's order.

Petitioner appealed the District Court's decision to the Ninth Circuit Court of Appeals. On November 3, 1986, that court entered its unpublished opinion affirming the Bankruptcy Court's order.

On January 29, 1987, Petitioner filed the instant Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REASONS FOR DENYING THE PETITION

ARGUMENT

I

The Purported Conflict Between the Circuits Is Immaterial to the Resolution of This Case

Petitioner predicates its petition exclusively upon a perceived conflict between the circuits regarding the operation of 11 U.S.C. section 548. In particular, Petitioner describes certain perceived differences between the holdings of *Durett v. Washington National Insurance Company,* 621 F.2d 201 (C.A.5th, 1980) and *In re Madrid,* 725 F.2d 1197 (C.A.9th, 1984), cert. denied 469 U.S. 833 (1985). This perception of conflict is immaterial to the case at bar because the cases construe different statutes. *Durrett v. Washington National Insurance Company* construed the fraudulent conveyance provisions of the former Bankruptcy Act, found

at repealed 11 U.S.C. section 67. *In re Madrid,* on the other hand, construed the fraudulent conveyance provisions of the current Bankruptcy Code, found at 11 U.S.C. section 548. While the similarity of these two statutes has provided the commentators and lower courts with ample grounds for comment and analysis, it cannot be said that the holdings of these two cases create a conflict between the circuits, within the ambit of Supreme Court Rule 17.1(a).

II

The Petition Does Not Articulate an Important Question of Federal Law which Should Be Settled by this Court

The Petition expresses dissatisfaction with the holdings of *In re Madrid, supra,* and the Ninth Circuit Court of Appeals below, presumably on the policy ground that the holdings "eliminate the flexibility" of the bankruptcy courts. Notwithstanding this generalized dissatisfaction, the Petition sets forth no grounds for concluding that the decision below involves some important question of federal law which should be decided by this Court. As a consequence, this Court should conclude that the Petition articulates no grounds under Supreme Court Rule 17.1(c) for the issuance of the requested writ.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

February 27, 1987

Respectfully submitted,

STEVEN B. STABLER*
ROBERT F. KIDD
LAWRENCE A. CALLAGHAN

**Counsel of Record*
for Respondent.

(Appendix follows)

APPENDIX R-A

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Eleventh Floor
411 West Fifth Street
Los Angeles, California 90013
(213) 622-6671
Attorneys for Debtor

United States Bankruptcy Court
Central District of California

Chapter 11
Bankruptcy No. LA 84-21176 BR
Adversary No. LA 84-53394 BR
In Re Dierk Hagemann,
Debtor.

Dierk Hagemann,
Plaintiff,

vs.

American Savings And Loan Association,
a California corporation,
Defendant.

COMPLAINT TO SET ASIDE DEED
(Defective Sale)
[Filed Dec. 21, 1984]

Debtor and plaintiff DIERK HAGEMANN (hereinafter, "HAGEMANN") for a cause of action against defendant AMERICAN SAVINGS AND LOAN ASSOCIATION ("AMERICAN") to set aside a trustee's sale of plaintiff's property alleges as follows:

1. On or about October 24, 1984, debtor and defendant Hagemann filed a voluntary petition under Chapter 11 of Title 11 of the United States Code to reorganize his financial affairs. Therefore, this Court has jurisdiction of the instant matter pursuant to 11 U.S.C. § 157.

2. At all times mentioned herein and relevant hereto, defendant AMERICAN was and is a California corporation engaged in the business of a savings and loan association and was and is doing business within the Central District of California.

3. Until the date of September 5, 1984, plaintiff and debtor HAGEMANN was the owner of that certain real property located at 631 Paseo de la Playa, in the City of Torrance, State of California. Said property was the principal residence of plaintiff HAGEMANN and his minor child. Defendant AMERICAN was the beneficiary of the first deed of trust on said property, which deed of trust secured a promissory note to AMERICAN in the approximate amount as of that date, inclusive of principal and accrued interest, of $340,000.00, more or less.

4. For various and diverse reasons beyond his control, plaintiff HAGEMANN was prior to the filing of the above-described Chapter 11 petition, in default at certain times with regard to the making of payments due under and pursuant to the promissory note secured by the above-described deed of trust. As a result of said default, defendant AMERICAN commenced foreclosure proceedings on or about February 27, 1984. Following the commencement of said foreclosure proceedings, plaintiff HAGEMANN entered into a Forebearance Agreement with defendant AMERICAN, which agreement set forth a schedule of payments intended to and which would have cured the default to AMERICAN. A copy of this Forebearance Agreement is attached hereto as Exhibit "1", and is incorporated herein by reference as though fully set forth at this point.

5. Pursuant to said Forebearance Agreement, defendant AMERICAN mailed a letter to plaintiff HAGEMANN purporting to be a notice of continuance of the sale date of the subject property. A copy of this letter is attached hereto as Exhibit "2", and is incorporated herein by reference as though fully set forth at this point.

6. Plaintiff HAGEMANN timely effected payments of the sums due July 1, 1984 and August 1, 1984. On September 5, 1984, at approximately 10:45 a.m., plaintiff HAGEMANN appeared at an office of AMERICAN SAVINGS with a cashier's

check for the payment due September 1, 1984. Said payment was refused by defendant AMERICAN at that time on the grounds that the trustee's sale took place on September 5, 1984, at 10:00 a.m. Plaintiff has been informed, and on the basis of such information believes and alleges that in fact said trustee's sale did take place at 10:00 a.m. on September 5, 1984. Said sale was defective, and the deed pursuant thereto a nullity, due to inadequate and improper notice of said trustee's sale as required by California Civil Code § 2924g(a). However, plaintiff has been informed and on the basis of such information believes and alleges that a trustee's deed pursuant to said purported sale was given to defendant AMERICAN and was recorded by defendant AMERICAN, and constitutes a cloud on plaintiff's title to and interest in said real property.

7. Plaintiff is informed, and on the basis of such information believes and alleges that defendant AMERICAN was the sole bidder at the trustee's purported sale, and that the amount bid and paid by defendant AMERICAN at said sale was the amount due under and pursuant to the above-described promissory note secured by said deed of trust. This amount, as hereinabove alleged, was the sum of $340,000.00, more or less. At the time of the purported trustee's sale of said property, the subject real property had a fair market value in excess of One Million One Hundred Thousand Dollars ($1,100,000). Said sale constituted a fraudulent transfer within the meaning and operation of 11 U.S.C. § 548.

8. Demand has been made upon defendant AMERICAN to restore the title to said property to debtor and plaintiff HAGEMANN, and defendant AMERICAN has wholly failed and refused, and continues to fail and refuse, to restore title to said property to debtor and plaintiff HAGEMANN.

9. The legal description of the real property affected by this Section is set forth in Exhibit "3" to this complaint, which is incorporated herein by reference as though fully set forth at this point.

WHEREFORE, debtor and plaintiff HAGEMANN prays for judgment as follows:

1. For an order of this Court setting aside the purported trustee's sale and deed issued and recorded pursuant thereto;

2. For an order of this Court declaring title to said property revested in the debtor and debtor-in-possession DIERK HAGEMANN;

3. For all costs of suit herein, including a reasonable sum by way of attorneys' fees; and

4. For such other and further relief as this Court deems just and proper.

Dated: December 21, 1984.

KADENACY, COHEN &
SCHWABER

/s/ By STEVEN A. SCHWABER
Steven A. Schwaber
Attorneys for Plaintiff

EXHIBIT 1

Loan No: 030-1003719
TS No:

FOREBEARANCE AGREEMENT

THIS FOREBEARANCE AGREEMENT is entered into this 5th day of July, 1984, by and between Dierk Hagemann ("Borrower") and AMERICAN SAVINGS AND LOAN ASSOCIATION formerly STATE SAVINGS AND LOAN ASSOCIATION a California Corporation ("Beneficiary").

RECITALS

A. Beneficiary has heretofore made a loan for which Borrower is liable, evidenced by a promissory note and secured by that certain Deed of Trust dated 4-1-84 and recorded 4-4-84;

B. On 2-27-84, and as a result of Borrower's default under the terms and conditions of said promissory note and Deed of Trust, Trustee, at the direction and on behalf of Beneficiary, commenced proceedings to foreclose on the Deed of Trust and, in accordance therewith recorded that certain Notice of Default as instrument number 84-236138, in the County of Los Angeles, State of California; and

C. To assist Borrower in curing said default, Beneficiary, agrees to accept, and Borrower agrees to make, partial payments pursuant to the terms and conditions set forth herein.

NOW THEREFORE, in consideration of the foregoing and other valuable consideration, the parties hereto agree as follows:

1. *Repayment Schedule.* Borrower agrees to make payments to Beneficiary, said payments to be applied by Beneficiary to the delinquent amounts owing under said promissory note and Deed of Trust, in accordance with the following schedule:

Due on July	1st 1984	Principal & Interest payment	$3,786.67	Rec. LA Br. 6-26-84
Due on Aug.	1st 1984	Principal & Interest payment	$3,786.67	Cashiers check only
Due on Sept.	1st 1984	Principal & Interest payment	$3,786.67	Cashiers check only
Due on Sept.	15th 1984	⅓ of Delinquency	$15,620.30	Cashiers check only
Due on Oct.	1st 1984	Principal & Interest payment	$3,786.67	Cashiers check only
Due on Oct.	15th 1984	⅓ of Delinquency	$15,620.30	Cashiers check only
Due on Nov.	1st 1984	Principal & Interest payment	$3,786.67	Cashiers check only
Due on Nov.	15th 1984	⅓ of Delinquency	$15,620.30	Cashiers check only

2. *Foreclosure Proceedings.* Until such time as all past due amounts have been paid bringing the subject loan to a current status, neither the acceptance nor processing of partial payments made by Borrower pursuant to the provisions of paragraph 1, above, shall (1) be deemed a waiver by Beneficiary of Borrower's default under the promissory note and Deed of Trust, (2) constitute a partial reinstatement of the subject loan and/or (3) affect in any respect beneficiary's foreclosure on the Deed of Trust.

3. *Default.* It is expressly understood that all payments made pursuant to this Agreement will be applied to the subject loan as specified herein and that none of the payments will be refunded should Borrower default under any of the terms and/or conditions of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date first above written.

AMERICAN SAVINGS & LOAN ASSOCIATION
Beneficiary

By Lesw Krieg
Department Manager

By _____

_____
Borrower

_____
Borrower

_____
Borrower

EXHIBIT 2

[Letterhead]

Mr. Dierk Hagemann
631 Paseo De La Playa
Torrance, CA 90277

July 3, 1984

Dear Mr. Hagemann,

Enclosed is the forebearance agreement, as discussed with your attorney Mr. Steve Schwaber. Please read and sign and return original to address below.

Please be advised that sale dates are set as follows:

Sale Date 7-11-84 was postponed 6-26-84 payment received
Sale Date 8-08-84 effected if 8-01-84 payment not received
Sale Date 9-05-84 effected if 9-01-84 payment not received
Sale Date 10-03-84 effected if 10-01-84 payment not received
Sale Date 11-07-84 effected if 11-01-84 payment not received

Should any of the scheduled payments not be met, the sale date becomes effective as shown, after each scheduled payment is made the Trustee Sales Officer postpones the sale date to the next month, if there are any questions regarding this please call me collect at the number below.

Sincerely,

AMERICAN SAVINGS
AND LOAN
540 E. Main Street
Stockton, CA 95202

/s/ Les Krieg
Les Kreig
Sr. Loan Counselor
(209) 943-3064

EXHIBIT 3

Lot 149 of Tract No. 18379, in the City of Torrance, County of Los Angeles, State of California, as per map recorded in Book 563 Pages 9 to 14 inclusive of Maps, in the office of the county recorder of said County.

EXCEPT all oil, gas and other hydrocarbon substances underlying said land, but upon the express understanding and agreement that no operations of any kind or character may at any time be conducted upon said land in exploration for or on the production of any such material and no facilities of any kind or character shall ever be erected or maintained upon said premises in connection with any such operation, and reserved in the deed from Ocean View Properties, Inc., recorded in Book 24379 Page 114, Official Records of said County.

ALSO EXCEPT any portions thereof lying outside of the patent lines of the Rancho Los Palos Verdes, as such lines existed at the time of the issuance of the patent, which were not formed by the deposit of alluvion from natural causes and by imperceptible degrees.

Said land is also known as 631 Paseo De La Playa, Torrance, California.